

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

----- x		
ExteNet Systems, LLC)	Civil Action No. 6:20-cv-7129-
Plaintiff,)	EAW-MWP
)	
vs.)	
)	
City of Rochester, New York)	
Defendant.)	
----- x		

DECLARATION OF T. SCOTT THOMPSON IN SUPPORT OF MOTION IN LIMINE

I, Scott Thompson, pursuant to 28 U.S.C. § 1746, declare and state as follows:

1. I am member at the law firm of Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, and counsel for plaintiff ExteNet Systems, LLC (“ExteNet”) in the above captioned matter admitted *pro hac vice*.

2. I respectfully submit this declaration in support of ExteNet’s motion in limine to exclude expert testimony by the City’s witness, Louie Tobias.

3. I make this declaration based on my personal knowledge and review of the non-privileged records related to this litigation.

4. The City did not identified any witness for expert testimony in this case.

5. The facts set forth in ExteNet’s Notice of Motion and Motion *In Limine* and the supporting Memorandum In Support of Motion *In Limine* are true and correct to the best of my knowledge.

6. Attached hereto as Exhibit 1 is a true and correct copy of the City’s April 29, 2021 Answers to Plaintiff’s First Set of Interrogatories and Requests for Production.

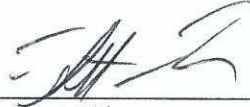
7. Attached hereto in pdf form as Exhibit 2 is a copy of the Spreadsheet produced by the City in native Excel format with Bates No. COR 000011. (*See also* Dkt. No. 30-22.)

8. Attached hereto as Exhibit 3 is is a true and correct copy of the transcript of the June 3, 2021 deposition of Louie J. Tobias taken in this case.

9. Attached hereto as Exhibit 4 is a true and correct copy of an excerpt of Volume 1 of the Deposition of Louie J. Tobias in *Cellco Partnership d/b/a Verizon Wireless v. City of Rochester*, 6:19-cv-06583-EAW-MWP take on February 9, 2021.

10. Attached hereto as Exhibit 5 is a true and correct copy of an excerpt of Volume 2 of the Deposition of Louie J. Tobias in *Cellco Partnership d/b/a Verizon Wireless v. City of Rochester*, 6:19-cv-06583-EAW-MWP, taken on February 10, 2021.

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.



T. Scott Thompson

Executed on February 24, 2023

Exhibit 1

DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

EXTENET SYSTEMS, INC.

Plaintiff,

vs.

CITY OF ROCHESTER,

Defendant.

DEFENDANT'S RESPONSES TO
PLAINTIFF'S FIRST SET OF
INTERROGATORIES AND
REQUESTS FOR PRODUCTION

Case 6:20-cv-7129

Defendant City of Rochester answers Plaintiff's First Set of Interrogatories and Requests for Production as follows:

General Objections

All responses are made without in any way waiving or intending to waive, but on the contrary, intending to preserve and preserving:

- All objections to questions as to competency, relevance, materiality, privilege, scope, and admissibility of evidence for any purpose in any subsequent proceeding or the trial of this or any other action.
- The right to object to the use of any of the answers or the subject matter thereof in any subsequent proceeding or the trial of this or any other action on any grounds.
- The right to supplement and/or amend these answers as the defendants' investigation, discovery and preparation for trial continues.

The defendant objects generally to each demand to the extent that it seeks discovery of:

- Confidential information, except as a suitable protective order is entered;
- Information subject to the attorney/client privilege, or any other privilege;
- Information constituting the work product of the defendants or their attorneys;

The defendant objects to plaintiff's interrogatories and document requests to the extent they purport to impose obligations not established by the Federal Rules of Civil Procedure or the Local Rules of Civil Procedure for the United States District Court for the Western District of New York

- 3) State the total quantity of Utility Infrastructure, broken down by each type, that was installed in 2015-2020 (please itemize by year) in the City ROW via attachment to above ground poles or infrastructure, direct buried, and underground in conduit.

RESPONSE: Defendant objects to Interrogatory No. 3 on the grounds that it is not properly limited in time or scope as it seeks information concerning right-of-way installations that were made prior to the passage of the City's Telecommunications Code or that are not subject to the City's Telecommunications Code or regulated by the Communications Act of 1934. Further, the City does not in all instances maintain records according to the "type of Utility Infrastructure" or the composition of wire or wirelines or other facilities installed. Notwithstanding and without waiving these objections, plaintiff is referred to the document previously provided, bearing Bates No. COR 000612, which sets forth the conduit, fiber-optic, and small cell installations in the City's right of way as of July 2020.

- 4) Regarding the document that appears as Excel file provided as part of the City's Rule 26 disclosures, Bates Numbered COR 000011, state the following:
- a. What the document is intended to describe; for example, whether the costs represent those associated with first year (installation) or with subsequent annual maintenance;
 - b. When it was created; and
 - c. The names and titles of the persons involved in creating it.

RESPONSE: Defendant objects to Interrogatory No. 4 on the grounds that the document previously produced and bearing Bates No. COR 000011 speaks for itself, that the questions here interposed are most appropriately addressed during a deposition, and that this interrogatory is vague and ambiguous. Notwithstanding and without waiving these objections, defendant states

that COR 000011 sets forth the approximate incremental personnel, operating and/or capital costs associated with installation and maintenance of telecommunications facilities in the right of way, breaking those costs down by department. The following is a key to the various terms and categories set forth in the spreadsheets:

- TITLE: Job Title of individual performing function or work
- #: Number of individuals engaged in the function or work
- ACTIVITY: Description of the function or work
- FTE: Full Time Equivalent (Annual)
- HOURS (ANNUAL): Number of Hours individuals in TITLE would perform ACTIVITY in budgeted year
- BRACKET: Salary Schedule designation for individual in the identified TITLE
- VALUE: Monetary calculation of Salary, Wages & Benefits based upon the identified input data: TITLE, #, BRACKET, HOURS, ET. AL.
- HOURS (DAILY) = Number of Hours individuals would perform ACTIVITY in a workday
- TEAM AVG.= HOURS (DAILY) individuals in the Department or Division would engage in ACTIVITY

The analysis set forth in COR 000011 aggregates the costs “associated with first year (installation)” and those relating to “subsequent annual maintenance.” As the metadata in the excel file demonstrates, the document was created by Louie Tobias, the City’s Telecommunications Director, on April 17, 2019.

- 5) Regarding the document entitled Telecom Staffing Inputs Bates Numbered COR 000011, identify the names and titles of those with knowledge of the following:
- a. The methodology used by the City to derive the amount in each cell of the spreadsheet, and the basis for each input and assumption used in that methodology;
 - b. The methodology used by the City to calculate or determine the number of personnel used in the various fields in the document, and the basis for each input and assumption used in that calculation; and
 - c. The methodology used by the City to arrive at the specific tasks included in the document, whether these tasks are fixed or variable with the total amount of construction, and whether each task is one-time, first-year, or recurring in nature.

RESPONSE: Defendant objects to Interrogatory No. 5 on the grounds that the request to identify all those with “knowledge of” the methodologies, inputs and assumptions related to the calculations set forth in COR 000011 is vague and overbroad in that it implicates any City agents or employees with almost any knowledge of COR 000011 or any of the data therein.

Notwithstanding and without waiving or otherwise limiting these objections, defendant identifies Louie Tobias, Director of Telecommunications and Special Projects, as the individual with knowledge of the three areas of methodology specified in this Interrogatory.

- 6) Identify any outside consultants, third parties, or non-City employees that assisted with or were consulted in the development of the document entitled Telecom Staffing Inputs, Bates Numbered COR 000011.

RESPONSE: Defendant objects to Interrogatory No. 6 on the grounds that it seeks irrelevant information. Notwithstanding and without waiving these objections, defendant states that no

Defendant further objects that this interrogatory is improperly limited in time because it seeks information concerning costs that predate the effective date of the Telecommunications Code. Notwithstanding and without waiving these objections, defendant identifies the following individuals as being familiar with activities performed by the City in relation to Crown Castle's recent installations of fiber in the City's right of way:

- Louie Tobias, Telecommunications Director
- Anthony Orphe, Deputy Commissioner of Environmental Services
- Kabutey Ocansey, Assistant Commissioner of Environmental Services
- Kamal Crues, Assistant City Engineer
- Bre'Asia Griffin, Senior Engineering Tech
- Marlana Zink, Senior GIS Analyst

DOCUMENT REQUESTS

- 1) Provide all documents on which the City relied on to establish, or that are related to, the basis for the fees set forth in the City Telecommunications Code.

RESPONSE: Defendant objects to Document Request No. 1 on the grounds that this request is vague, ambiguous, fails to adequately articulate the particular Code Sections or Fees about which information is sought, and it seeks information that is beyond the scope of the complaint, that is irrelevant, or that is not likely to result in the discovery of admissible evidence. The question that plaintiff's suit poses is whether the fees in the City's telecommunications code exceed a reasonable approximation of the City's objective reasonable costs related to telecommunications infrastructure in the right of way. Accordingly, the manner in which the City arrived at those fees in the first instance, and the documents relies upon in reaching those fees, if any, have no

relevance to this matter. Even assuming the validity of plaintiff's theory and the FCC's Declaratory Ruling and Third Report and Order in the matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment ("Small Cell Order"), the Small Cell Order itself acknowledges that "a fee not calculated by reference to costs might nonetheless happen to land at a level that is a reasonable approximation of objectively reasonable costs, and otherwise constitute fair and reasonable compensation as we describe herein. If all these criteria are met, the fee would not be preempted." Accordingly, the only relevant issue even under Plaintiff's theory, is whether the fees are within a reasonable approximation of costs, irrespective of any "documents on which the City relied on to establish, or that are related to, the basis for the fees set forth in the City Telecommunications Code."

- 2) Provide all documents that the City contends demonstrate that the fee amounts set forth in Article IV of the City Telecommunications Code reflect the City's reasonable costs incurred to manage ExteNet's occupation of the public rights of way.

RESPONSE: Defendant objects to Document Request No. 2 on the grounds that it is vague, ambiguous, fails to adequately articulate the particular Code Sections or Fees about which information is sought, and it seeks information that is beyond the scope of the complaint, that is irrelevant, or that is not likely to result in the discovery of admissible evidence. Notwithstanding and without waiving or limiting these objections, Plaintiff is directed to the documents previously provided, bearing Bates Nos. COR 000001 – COR 000611; COR 000614 – COR 000676.

services). Defendant also objects on the grounds that this request implicates the attorney-client and attorney-work product privileges.

19) Provide all documents demonstrating the City's costs caused by the presence of Utility Infrastructure in the ROW for each of the following City departments:

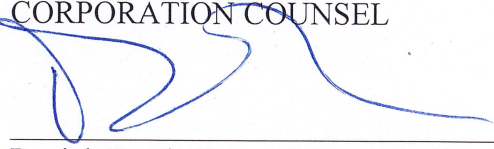
- a. Hazard / Emergency Response;
- b. Administration;
- c. IT;
- d. Finance; and
- e. Law.

RESPONSE: Defendant objects to Document Request No. 19 on the grounds that it is vague insofar as it appears to seek total department costs of all "Utility Infrastructure in the ROW" without regard to time or purpose for work in the right of way, or its nexus to telecommunications providers or the City's Telecommunications Code. As such, this request is not proportional to the case as it appears to seek all ROW costs, not just those related to telecommunications facilities installed in the ROW. Notwithstanding and without waiving these objections, plaintiff is referred to the documents previously disclosed, bearing Bates Nos. COR 000001 – COR 000611 and COR 000614 – COR 000676, as well as to the documents provided herewith, bearing Bates Nos. COR 000681 – COR 000705.

Dated: April 29, 2021

TIMOTHY R. CURTIN
CORPORATION COUNSEL

BY:


Patrick Beath, Esq., of Counsel

Attorneys for Defendants

30 Church Street, Room 400A City Hall
Rochester, NY 14614
Telephone: (585) 428-6812

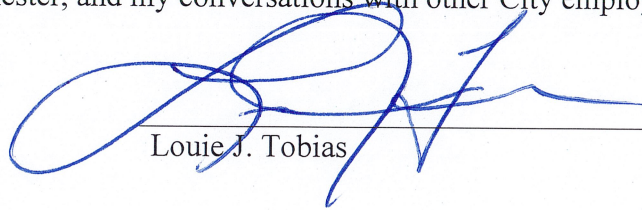
To: Haran C. Rashes, Esq.
EXTENET SYSTEMS, INC.
3030 Warrenville Road, Suite 340
Lisle, Illinois 60532
(630) 245-2064
hrashes@extenetsystems.com

T. Scott Thompson, Esq.
MINTZ, LEVIN, COHN, FERRIS, GLOVSKY & POPEO, P.C.
701 Pennsylvania Avenue NW, Suite 900 Washington, DC 20004
Tel: 202-434-7440
SThompson@Mintz.com

VERIFICATION

State of New York)
County of Monroe) ss:

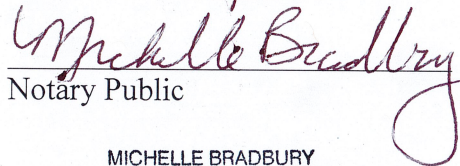
I, Louie J. Tobias, being duly sworn, deposes and says that I am the Director of Telecommunications & Special Projects for the City of Rochester, which is the defendant in this matter. I have read the foregoing answers to the plaintiff's First Set of Interrogatories and I know their contents to be true based upon my own personal knowledge, my review of records and documents of the City of Rochester, and my conversations with other City employees.



Louie J. Tobias

Sworn to before me this

29th day of April, 2021



Notary Public

MICHELLE BRADBURY
Notary Public State of New York
Qualified in Monroe County - 01BR6315209
Commission Expires November 24, 2022

Exhibit 2

[illegible]

[illegible]

[illegible]

[illegible]

	A	B	C	D	E	F	G	H	M	O	Q
136		Administration			Related Indirect Expenditures (Software Licenses, GIS) System Support, Data Security & Storage, Records Management, Accounting, Invoicing						
137											
138		IT			Software Licenses, GIS) System Support, Data Security & Storage, Records Management						
139			Manager	9		0.05	104	31	\$ 6,828	0.40	0.22
140			Analyst I-III	14		0.25	520	28	\$ 30,837	2.00	0.71
141			Engineer	5		0.15	312	26	\$ 17,181	1.20	1.20
142											
143		Finance			Accounting, Invoicing						
144			Accountant (Sr./ Assoc.)	11		0.025	52	22	\$ 2,423	0.20	0.09
145			Account Clerk (Jr. - Head)	4		0.025	52	15	\$ 1,652	0.20	0.25
146											
147		Law	Municipal Attorney (I-IV)	12	MLA, Compliance, Legislation et. al.	0.05	104	29	\$ 6,388	0.40	0.17
148				55		0.55	1144		\$ 65,309	4.40	0.08
149											
153				1118		10.06	20919.6	145.66	\$ 954,128	57.31	
154		Citywide									
155		FTE count	3204		PerCent of City Total	0.31%	0.3139%		0.1717%		
156		Budget	\$555,708,100								
158											
159			Maintenance & Repair								
160			Equipment Lighting		\$ 432,613				\$ 72,102		16.7%
161			GIS Upgrade		\$ 125,000				\$ 40,179		32.1%
162			Professional services		\$ 47,500				\$ 7,917		16.7%
163			Rental Storage		\$ 97,772				\$ 3,911		4.0%
164			ROW Maintenance Op. Div		\$ 13,328,700				\$ 1,199,583		9.0%
165			ROW Maintenance ESD		\$ 2,510,940				\$ 105,016		4.2%
166			ROW Maintenance Water		\$ 3,404,230				\$ 272,338		8.0%
167			A&E Ongoing		\$ 350,764,556				\$ 2,630,734		0.8%
168											
169											
170									\$ 4,331,780		
181									\$ 5,285,908		
182			Conduit (under mgmnt)		431566.8 ft						
183			Fiber (under mgmnt)		431252.609 ft						

	A	B	C	D	E	F	G	H	M	O	Q
184					862819.409	ft					
185									\$ 6.13	per ft	

	A	B	C	D	E	F	G	H	M	O	Q
136		Administration			Related Indirect Expenditures (Software Licenses, GIS) System Support, Data Security & Storage, Records Management, Accounting, Invoicing						
137											
138		IT			Software Licenses, GIS) System Support, Data Security & Storage, Records Management						
139			Manager	9		0.1	208	31	\$ 13,657	0.80	0.44
140			Analyst I-III	14		0.5	1040	28	\$ 61,675	4.00	1.43
141			Engineer	5		0.25	520	26	\$ 28,635	2.00	2.00
142											
143		Finance			Accounting, Invoicing		0			0.00	
144			Accountant (Sr./ Assoc.)	11		0.1	208	22	\$ 9,692	0.80	0.36
145			Account Clerk (Jr. - Head)	4		0.1	208	15	\$ 6,608	0.80	1.00
146											
147		Law	Municipal Attorney (I-IV)	12	MLA, Compliance, Legislation et. al.	0.3	624	29	\$ 38,326	2.40	1.00
148				55		1.35	2808		\$ 158,592	10.80	0.1964
149											
150											
151											
152											
153				1118		13.89	28886	105.49	\$1,314,218	79.14	
154		Citywide									
155		FTE count	3204		PerCent of City Total	0.43%	0.4334%		0.2365%		
156		Budget	\$555,708,100								
157		Hours (Bud)	6664320								
158											
159											
160		Current Deployment	88 Installations		138 Approved						
161		Proposed Deployments	300 Annual Installation 2020-2025		1800 New Installations				\$ 4,381	Per Pole	
162		Proposed Deployments	200 Annual Installation 2020-2028		1800 New Installations				\$ 6,571	Per Pole	
163											
164		Approximately 324 annual emergency occurrences with current inventory 82 small cell involved projected with proposed deployments									

Exhibit 3

1 UNITED STATES DISTRICT COURT

2 WESTERN DISTRICT OF NEW YORK

3 - - -

4 ExteNet Systems, Inc., :

5 Plaintiff, : Civil Action No.

6 vs. : 6:20-CV-7129

7 City of Rochester, New York, :

8 Defendant. :

9 - - -

10 June 3, 2021

11 - - -

12
13 Remote deposition of CITY OF

14 ROCHESTER through its witness, Louie Tobias was

15 taken pursuant to notice, beginning at 9:37 a.m.

16 on the above date before Gail L. Inghram Verbano,

17 Registered Diplomate Reporter, Certified Realtime

18 Reporter, Certified Shorthand Reporter-CA (No.

19 8635)and Notary Public, there being present via

20 videoconferencing:

21 - - -

1 A P P E A R A N C E S:

2 On behalf of Plaintiff:

3 T. SCOTT THOMPSON, ESQ.

4 sthompson@mintz.com

5 JON GARVIN, ESQ.

6 jgarvin@mintz.com

7 MINTZ, LEVIN, COHN, FERRIS, GLOVSKY & POPEO PC

8 701 Pennsylvania Avenue, NW, Suite 900

9 Washington, DC, 20004

10 202.434.7440

11
12
13 On behalf of The City of Rochester:

14 PATRICK BEATH, ESQ.

15 patrick.beath@cityofrochester.gov

16 City of Rochester, New York Law Department

17 30 Church Street, Room 402a

18 Rochester, New York 14614-1206

19 585.428.5990

20
21 ALSO PRESENT:

22 KEN AMRHEIN, Legal Technician

23 HARAN RASHES, ESQ., ExteNet

- - -
I N D E X
- - -

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1 DEPOSITION SUPPORT INDEX

3 QUESTIONS INSTRUCTED NOT TO ANSWER:

4 PAGE LINE

5 (None)

7 REQUEST FOR PRODUCTION OF DOCUMENTS

8 PAGE LINE

9 (None)

12 STIPULATIONS

13 PAGE LINE

14 (None)

16 QUESTIONS MARKED

17 PAGE LINE

18 (None)

21 REPORTER'S NOTE:

22 QUOTATIONS MARKS ARE USED FOR CLARITY AND DO NOT

23 NECESSARILY INDICATE A DIRECT QUOTATION

<p>1 bridge stabilization.</p> <p>2 A. Probably not.</p> <p>3 Q. When you say probably not, why?</p> <p>4 A. That one is a -- it's not a</p> <p>5 reconstruction. It really is where you have to</p> <p>6 reallocate -- you know, relocate, rebuild and</p> <p>7 then rerun. That one is more of a -- a</p> <p>8 structural shoring up of a facility that is along</p> <p>9 the riverway.</p> <p>10 Q. Let's talk -- what about</p> <p>11 structural engineering term services contract?</p> <p>12 A. I'm sure that there is some in</p> <p>13 there, but it's a nonspecific. It's a -- you</p> <p>14 know, as you -- when you do -- you know, we have</p> <p>15 a contract with a structural engineer that does</p> <p>16 inspections throughout the City, or performs</p> <p>17 structural engineering work throughout the City.</p> <p>18 So that could be on a project that does include</p> <p>19 telecom or a project that does not.</p> <p>20 Q. What about the Triphammer Gorge</p> <p>21 building emergency repairs?</p> <p>22 A. I do not believe so.</p> <p>23 Q. Trip -- so I assume -- well,</p> <p>24 Triphammer Gorge wall assessment?</p>	<p>Page 170</p>	<p>1 A. I would say the Main Street</p> <p>2 streetscape Phase II would probably fall in that</p> <p>3 category.</p> <p>4 Q. You say "probably." Do you know</p> <p>5 for certain?</p> <p>6 A. No. Remember, I'm giving you an</p> <p>7 informed understanding.</p> <p>8 Q. Okay.</p> <p>9 A. If you want the absolute, you have</p> <p>10 to bring in the A & E division folks that create</p> <p>11 the document and can tell you the actual scope of</p> <p>12 each and every one of those, who are the people</p> <p>13 that we sat down with to figure out how much of</p> <p>14 this should be attributable, how much should not</p> <p>15 be.</p> <p>16 So I am giving you the answers</p> <p>17 secondhand based upon my recollection. I don't</p> <p>18 examine the engineering documents here.</p> <p>19 Q. So then let me ask you to look</p> <p>20 back at Exhibit 5 again, the right-of-way costs.</p> <p>21 A. Uh-huh.</p> <p>22 Q. And then it looks like from the</p> <p>23 formula that the way that you've attributed this</p> <p>24 is you've attributed .8 --</p>	<p>Page 172</p>
<p>1 A. I would assume not.</p> <p>2 Q. Let's talk about -- go back up for</p> <p>3 a second. Is that pronounced "Pont de Rennes"?</p> <p>4 A. Pont de Rennes.</p> <p>5 Q. So I see that the construction</p> <p>6 here is anticipated 2023. And it says, "Project</p> <p>7 status consultant selected." What is that --</p> <p>8 what is your understanding of what that means the</p> <p>9 status is as of 2020? They spent \$9 million on</p> <p>10 this?</p> <p>11 A. No, they have not.</p> <p>12 Q. Okay. It sounds like, from</p> <p>13 project status, that all they've done is identify</p> <p>14 a consultant. Is that --</p> <p>15 A. That may be true.</p> <p>16 Q. Okay. Let's keep going down the</p> <p>17 list. We're under the blue grouping, the</p> <p>18 landscape architecture, active projects in</p> <p>19 design.</p> <p>20 Are any of these attributable to</p> <p>21 the telecom and the public right-of-way?</p> <p>22 And rather than go one by one, why</p> <p>23 don't you just tell me if you see any of them</p> <p>24 that you believe are.</p>	<p>Page 171</p>	<p>1 A. percent.</p> <p>2 Q. -- percent to the 350 million as</p> <p>3 being attributable to telecom; is that accurate?</p> <p>4 A. That's correct.</p> <p>5 Q. What was the source of the</p> <p>6 .8 percent?</p> <p>7 A. That was a very conservative</p> <p>8 estimate by, just like you're asking me, I asked</p> <p>9 other folks, you know, Of these, which of these</p> <p>10 relate to telecom? Of these, how many of these</p> <p>11 are going to go in any given year?</p> <p>12 And we got to a number that was</p> <p>13 much larger than that, and we used a portion of</p> <p>14 that number.</p> <p>15 Q. And so who did you ask?</p> <p>16 A. I spoke with my street design</p> <p>17 folks, my assistant city engineers, my</p> <p>18 construction maintenance people. Everybody up in</p> <p>19 that first A & E number.</p> <p>20 Q. So can you give me -- can you give</p> <p>21 me the names of the specific people that you</p> <p>22 talked to that led to -- all of those people told</p> <p>23 you what they thought the percentage of --</p> <p>24 A. No, those people -- those</p>	<p>Page 173</p>

C E R T I F I C A T I O N

I hereby certify that I have read
the foregoing transcript of my deposition
testimony, and that my answers to the questions
propounded, with the attached corrections or
changes, if any, are true and correct.

LOUIE TOBIAS

1

- - -

2

E R R A T A S H E E T

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- - -

4

5

PAGE

LINE

CHANGE

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1 CERTIFICATE OF SHORTHAND REPORTER

2
3 I, Gail Inghram Verbano,
4 Registered Diplomate Reporter, Certified Realtime
5 Reporter, Certified Shorthand Reporter (CA) and
6 Notary Public, the officer before whom the
7 foregoing proceedings were taken, do hereby
8 certify that the foregoing transcript is a true
9 and correct record of the proceedings; that said
10 proceedings were taken by me stenographically and
11 thereafter reduced to typewriting under my
12 supervision; and that I am neither counsel for,
13 related to, nor employed by any of the parties to
14 this case and have no interest, financial or
15 otherwise, in its outcome.

16
17
18 

19 _____
20 Gail Inghram Verbano, CSR, RDR, CRR
21 CA-CSR No. 8635
22
23
24

Exhibit 4

1
2 UNITED STATES DISTRICT COURT
3 WESTERN DISTRICT OF NEW YORK

4 -----)
5 CELLCO PARTNERSHIP d/b/a
6 VERIZON WIRELESS,

7 Plaintiff,

8 vs.

No. 6:19-cv-06583
EAW-MWP

9 CITY OF ROCHESTER,

10 Defendant.

11 -----)
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14
15 REMOTE DEPOSITION OF LOUIS TOBIAS
16 New York, New York
17 February 9, 2021
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21
22
23

24 Reported by:
Linda Salzman
25 JOB NO. 189232

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1 L. Tobias
2 And so we needed that
3 information to be able to get to a place
4 where we were able to accurately identify
5 the City costs. So we went from small --
6 you know, from the most elemental level
7 and worked our way up, and then we added
8 it all up and ended with a summary.
9 The overall big picture thing
10 was just a comparison for us to understand
11 of our overall budget, what are we doing
12 as it relates to this.
13 Q. Okay. Did you keep notes of
14 these interviews or records of these
15 interviews and the information provided?
16 A. I will say that I'm sure that
17 there's somewhere that maybe that I wrote
18 on a piece of paper or in a pad or on an
19 earlier version of a spreadsheet that
20 maybe I got that said, hey, da, da, da,
21 da.
22 But did I -- if you come to my
23 office now, you will see that I have much
24 more paper than I need and I consistently
25 clean house.

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1 L. Tobias
2 A. What I asked them was, tell me
3 what you do. How much of your day is done
4 doing that. Yes. I asked that question,
5 you know, just like you asked me what
6 percentage do I do this or do that.
7 If there was an inspector and
8 that inspector inspects multiple things, I
9 would say, okay, if you do a hundred
10 inspections a week, how many of those are
11 for this, and then they would tell me.
12 Then they may say to me, oh, I do ten out
13 of a hundred. And I would say, oh, so you
14 spent 10 percent of your time on that?
15 They would say yes or they may say no, no,
16 no. Those are much more intensive than
17 the others that I do.
18 So in compiling the actual
19 number and the hours and the timing,
20 because as you have already noted, we
21 don't account that way. It was from those
22 interviews and those conversations that we
23 were able to come up with those
24 allocations.
25 Q. Okay. I just wanted -- using

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1 L. Tobias
2 Q. Okay.
3 A. So once I actually memorialize
4 some issue, once someone told me, okay, on
5 any given day I made five visits to that,
6 I didn't -- you know, I may have written
7 it on a piece of paper. But you know,
8 that might have been Version 4 of a
9 document that may have ended up with 54
10 versions or some ridiculous number like
11 that.
12 Q. Okay. I asked you about the
13 concept of, you know, allocating overhead
14 of existing costs. And I just wanted --
15 I'm not sure I got an answer to that
16 question.
17 So part of the exercise that you
18 performed were to look at the functions of
19 various personnel that are employed by the
20 City, correct?
21 A. Correct.
22 Q. And you asked each of those
23 people to tell you how much time they
24 approximate that they spend on certain
25 tasks, right?

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1 L. Tobias
2 your example, let's just say you have an
3 inspector that inspects multiple things
4 and they did confirm to you that he spent
5 10 percent of his time inspecting things
6 that you're tracking on one of your
7 right-of-way spreadsheets that are marked
8 as Exhibit 9 or Exhibit 10.
9 A. Uh-huh.
10 Q. That inspector's salary, let's
11 just assume it's \$100,000 a year. I'm
12 just using a big round number. I know you
13 provided salary information, and that's
14 not it.
15 But let's just say the salary is
16 \$100,000. That \$100,000 is overhead to
17 the City, correct?
18 A. I want to say yes. But I want
19 to make sure I understand what your
20 definition of overhead is.
21 Q. Overhead are the costs to run
22 the City, right? The costs to run the
23 City, irrespective of incremental tasks,
24 let's just call them, or extra tasks,
25 additional tasks that are otherwise not

Exhibit 5

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2 UNITED STATES DISTRICT COURT
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EAW-MWP

9 CITY OF ROCHESTER,

10 Defendant.
11 -----)

12
13
14 REMOTE DEPOSITION OF LOUIE TOBIAS

15 New York, New York

16 February 10, 2021

17 Volume II
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24 Reported by:
Linda Salzman
25 JOB NO. 189233

<p style="text-align: right;">Page 323</p> <p>1 L. Tobias</p> <p>2 you're allowed to charge your per pole</p> <p>3 cost to providers, your analysis would</p> <p>4 justify charging providers nearly 15,000</p> <p>5 per pole, correct?</p> <p>6 A. You used the word justify and</p> <p>7 you said interpretation of the FCC order.</p> <p>8 My interpretation of the FCC</p> <p>9 order is that we are allowed to charge</p> <p>10 anything that a reasonable approximation</p> <p>11 of up to and a reasonable approximation of</p> <p>12 what our charges are. We chose -- even</p> <p>13 though a reasonable approximation of our</p> <p>14 charges are significantly above what we're</p> <p>15 asking, we chose to use that language of</p> <p>16 up to of some number less than that.</p> <p>17 If what you're asking is if 1.3</p> <p>18 million divided by 88 is some number that</p> <p>19 you said is \$15,000, I'll stipulate to the</p> <p>20 math.</p> <p>21 Q. Okay. If we were to use your</p> <p>22 analysis of -- and I believe that's what's</p> <p>23 reflected in the interrogatory response as</p> <p>24 well, is that the determination was that</p> <p>25 you determined that the objectively</p>	<p style="text-align: right;">Page 324</p> <p>1 L. Tobias</p> <p>2 reasonable cost per pole is 4381 per year,</p> <p>3 assuming 300 installations annually from</p> <p>4 2020 to 2025, you would then have -- year</p> <p>5 one, you would have the 300 installations.</p> <p>6 In year two, if things go on</p> <p>7 track according to your assumptions, you</p> <p>8 would have 600 installations, correct?</p> <p>9 A. Correct.</p> <p>10 Q. And in year three, you would</p> <p>11 have 900 installations, correct?</p> <p>12 A. Correct, above and beyond those</p> <p>13 that already exist.</p> <p>14 Q. And in year four, you would have</p> <p>15 1500 installations, correct?</p> <p>16 A. Correct.</p> <p>17 Q. Did you do anything to account</p> <p>18 for -- to make sure that the aggregate</p> <p>19 fees that you would be charging by the</p> <p>20 time you have 1500 installations are</p> <p>21 reflective of the City's actual costs with</p> <p>22 respect to the -- I believe you call it</p> <p>23 the year-outs from the installation?</p> <p>24 A. I'll have to reiterate the</p> <p>25 answer that I gave that at any given time</p>
<p style="text-align: right;">Page 325</p> <p>1 L. Tobias</p> <p>2 we're doing three things. We are managing</p> <p>3 the existing installations; we are</p> <p>4 permitting and dealing with the</p> <p>5 installations that are current</p> <p>6 contemporaneously; and we are dealing with</p> <p>7 these are coming in the future.</p> <p>8 I also said that while the 1.3</p> <p>9 is the floor, as those things go up, I</p> <p>10 know that the 1.3 associated with the City</p> <p>11 will also go up. And also, as you know,</p> <p>12 the number, the 4,381 per pole, is</p> <p>13 significantly above the number that we are</p> <p>14 charging.</p> <p>15 Q. Well, if I follow your math and</p> <p>16 your logic and what you've relied upon in</p> <p>17 this case, because I didn't see any</p> <p>18 analysis that provided costs in excess of</p> <p>19 \$1.3 million a year, by year four, with</p> <p>20 1500 installations, according to your</p> <p>21 math, the cost would be \$876 per pole.</p> <p>22 A. And that's assuming that the 1.3</p> <p>23 never changes.</p> <p>24 Q. I haven't been provided with any</p> <p>25 other analysis that suggests that it will.</p>	<p style="text-align: right;">Page 326</p> <p>1 L. Tobias</p> <p>2 A. Okay. I don't mean to -- okay.</p> <p>3 If it costs \$1.3 million to manage 88</p> <p>4 units, to manage them, to permit them, to</p> <p>5 deal with the emergencies of them, it is a</p> <p>6 very simple next step, that if you then</p> <p>7 increase that number by 1800</p> <p>8 installations, that you will no longer be</p> <p>9 able to do that job for the same \$1.3</p> <p>10 million.</p> <p>11 That was not an analysis that I</p> <p>12 thought that we needed to provide to make</p> <p>13 the next step. But it that's necessary,</p> <p>14 maybe we can go back to the drawing board</p> <p>15 and then that number becomes 10 million,</p> <p>16 15 million, 20 million.</p> <p>17 Q. You're telling us that's what</p> <p>18 would happen?</p> <p>19 A. What I'm telling you is I can</p> <p>20 unequivocally tell you that the number is</p> <p>21 going to be bigger than \$1,314,000 and</p> <p>22 314, 218 dollars. That's what I'm telling</p> <p>23 you.</p> <p>24 Q. Did you do anything to make sure</p> <p>25 all the costs you were counting were</p>

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1 L. Tobias
2 objectively reasonable?
3 A. Can you define what you mean by
4 objectively reasonable?
5 Q. What does objectively reasonable
6 mean to you? I guess doesn't matter what
7 it means to me.
8 A. Well, what I ask people to
9 provide for me is what it was that they
10 were doing. What I asked people to
11 provide for me is how much the City was
12 expending upon that.
13 I believe that objectively
14 reasonable is that we have a number that
15 we have assessed as actual or projected
16 expenditures performing a particular duty,
17 that none of them seem outrageous.
18 The opposite of objectively
19 reasonable for me is outrageous or
20 ridiculous. I don't see anything that
21 we've come up with that didn't -- that
22 said to me that doesn't make any sense and
23 we shouldn't be doing that.
24 So my common sense test kicked
25 in and these numbers meet my common sense

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1 L. Tobias
2 A. When you say calculations and
3 analysis, what are you referring to? I
4 don't know what you mean there.
5 Q. Well, I see that in Columns E,
6 K, L, M, there are some formulas that are
7 being applied. For example, in line 167,
8 you are taking the result of 300 divided
9 by 1800 and multiplying it by the 432,613.
10 A. I believe that is just simply
11 how much of that would be applicable in
12 any given year. The 300 is the number of
13 expected deployments. 800 is the total
14 number of -- 1800 is the total number of
15 deployments over that five-year period.
16 And I think that it was taking
17 that number, that overall number, that was
18 in Column E or K, and making it an
19 annualized number. And that -- all of the
20 stuff from 167 to 182 I believe was then
21 put on the underground sheet, because
22 those were costs that were associated
23 above and beyond the non-small cell but
24 associated with telecommunications within
25 the right-of-way.

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1 L. Tobias
2 reasonable smell test.
3 Q. Okay. I realize that in my
4 effort to unhide the Excels, I missed some
5 at the bottom. When I unhide on the input
6 date sheet -- not the UG sheet, the other
7 one -- lines 166 to 182, there is an
8 information populated in those fields.
9 Are you able to unhide them?
10 A. 166 to 182?
11 Q. Yes.
12 A. I did.
13 Q. Okay. I see that there is all
14 those additional categories that we were
15 discussing on the UG sheet when we were
16 looking at Exhibit 10.
17 A. Yes.
18 Q. And there seems to be some
19 calculations and analysis done.
20 Why did you count these
21 categories on the UG sheet and -- although
22 they're reflected here on the input date
23 sheet, they don't appear to be added to
24 your costs in the same manner they were on
25 the UG sheet?

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1 L. Tobias
2 Q. Okay. So this rows 167 to 187
3 on the input data sheet did not impact
4 your analysis with respect to the costs of
5 the small cell attachments?
6 A. No. And if you look at it, I
7 believe that was just simply cut and
8 pasted from the input data sheet and moved
9 to the input data UG sheet. And so there
10 are no calculations on the input data
11 sheet that relates to those numbers that
12 are in columns 167 through 185.
13 Q. Okay. Thank you.
14 I'm sorry if I've asked this,
15 but can you just clarify for me why these
16 items we're discussing count on the UG
17 spreadsheet but don't count on the input
18 data spreadsheet?
19 A. At one point in time, when I
20 initially asked the questions to people to
21 tell me what it is they do and how it
22 related to the telecom industry within the
23 right-of-way, they came and they gave me
24 these numbers and they gave me the
25 activities.